



May 10, 1999

Ms. Margaret Hoffman  
Director  
Texas Natural Resource Conservation Commission  
P.O. Box 13087  
Austin, Texas 78711-3087

OR99-1263

Dear Ms. Hoffman:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 123325.

The Texas Natural Resource Conservation Commission (the "commission") received a request for air contaminant and other information relating to a proposed project by American Acryl and Elf Atochem (the "companies") in Bayport, Texas, and to existing facilities of such companies in Crosby and Houston. You ask whether portions of the requested information may be withheld under sections 552.101, 552.110, and 552.111 of the Government Code. You have submitted copies or representative samples of the information at issue.<sup>1</sup>

Section 552.101 of the Government Code requires withholding, *inter alia*, information made confidential by statute. Section 382.041(a) of the Health and Safety Code provides in part, with exceptions which do not appear to apply here, that "a member, employee, or agent of the commission may not disclose information submitted to the commission relating to secret processes or methods of manufacture or production that is identified as confidential when submitted." Open Records Decision No. 652 (1997) ruled, however, that if the commission seeks to withhold information from disclosure under section 382.041, it must seek the decision of this office under the provisions of chapter 552 of the Government Code, the Texas Public Information Act. If the information was identified as confidential when it was submitted to the commission, this office will permit withholding the information to the extent a *prima facie* case is made that the information is a "trade secret." *Id.*

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<sup>1</sup>In reaching our conclusion, we assume that "representative samples" of records submitted to this office are truly representative of the requested records as a whole. See Open Records Decision No. 499 (1988), 497 (1988) (where requested documents are numerous and repetitive, governmental body should submit representative sample; but if each record contains substantially different information, all must be submitted). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

A “trade secret”

may consist of any formula, pattern, device or compilation of information which is used in one’s business, and which gives [one] an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business in that it is not simply information as to single or ephemeral events in the conduct of the business, as for example the amount or other terms of a secret bid for a contract or the salary of certain employees. . . . A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as for example, a machine or formula for the production of an article. It may, however, relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939) (emphasis added). *See also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

There are six factors to be assessed in determining whether information qualifies as a trade secret:

- 1) the extent to which the information is known outside of [the company’s] business;
- 2) the extent to which it is known by employees and others involved in [the company’s] business;
- 3) the extent of measures taken by [the company] to guard the secrecy of the information;
- 4) the value of the information to [the company] and to [its] competitors;
- 5) the amount of effort or money expended by [the company] in developing this information; and

- 6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision No. 232 (1979).

We have solicited arguments from the companies pursuant to section 552.305 of the Government Code. You advise that the commission's engineers have determined "the information claimed to be trade secrets does meet factors (1), (3), and (6) in the Restatement," but you express no opinion with regard to the satisfaction of the other factors. Having reviewed these arguments and the information for which the protection of section 382.041 is claimed, we conclude that you may withhold attachments 1 through 5 and attachments 9 and 10 under that section in conjunction with section 552.101 of the Government Code.

You advise that the attachment 5a material is the kind that was found to be public in Attorney General H-539 (1975). That opinion cited, *inter alia*, federal law now at title 42 U.S.C. section 7414(c) for the proposition that emission data submitted to the commission's predecessor, the Texas Air Control Board, is public. Based on your representations and Attorney General H-539, we conclude that attachment 5a must be released.

With respect to attachments 6 and 6a, you claim the protection of section 552.111. Section 552.111 of the Government Code excepts interagency and intra-agency memoranda and letters, but only to the extent that they contain advice, opinion, or recommendation intended for use in the entity's policymaking process. Open Records Decision No. 615 (1993). The purpose of this section is "to protect from public disclosure advice and opinions *on policy matters* and to encourage frank and open discussion within the agency in connection with its decision-making processes." *Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.--San Antonio 1982, writ ref'd n.r.e.) (emphasis added). In Open Records Decision No. 615, this office held that

to come within the [section 552.111] exception, information must be related to the *policymaking* functions of the governmental body. An agency's policymaking functions do not encompass routine internal administrative and personnel matters . . . [Emphasis in original.]

In Open Records Decision No. 429 (1985), this office indicated that information protected by section 552.111 must be prepared by a person or entity with an official reason or duty to provide the information in question. *See also* Open Records Decision Nos. 283 (1981), 273 (1981). This helps assure that the information plays a role in the deliberative process; if it does not, it is not entitled to protection under section 552.111. Open Records Decision No. 464 (1987). *See Wu v. National Endowment of the Humanities*, 460 F.2d 1030 (5th Cir.), *cert. denied*, 410 U.S. 926 (1972).

Section 552.111 does not protect facts and written observation of facts and events that are severable from advice, opinions, and recommendation. Open Records Decision No. 615. If, however, the factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make separation of the factual data impractical, that information may be withheld. Open Records Decision No. 313 (1982).

You claim that "portions" of attachments 6 and 6a include records containing opinions of commission employees protected by section 552.111. We have marked a portion of attachment 6 which we believe constitutes "advice, opinion, or recommendation" protected by section 552.111, and which you may thus withhold. However, we do not believe that you have demonstrated how the remaining, unmarked portions of attachments 6 or any of attachment 6a fall within the protection of section 552.111.

You and the company both indicate, however, that exhibits 6 and 6a contain information made confidential under section 382.041(a) of the Health and Safety Code. To the extent that attachments 6 and/or 6a contain information which we have also permitted you to withhold under section 382.041(a) per our discussion, *supra*, you must also withhold that information from attachments 6 and 6a. Except for such portions of attachments 6 and 6a, and for the portion of attachment 6 we have permitted you to withhold under section 552.111 of the Government Code, you must release attachments 6 and 6a.

With respect to attachment 8, the companies claim the protection of common-law privacy, as incorporated in section 552.101, and section 552.103, the litigation exception. Section 552.103(a) excepts from required public disclosure information

(1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

Section 552.103 enables a governmental body to protect its interest in litigation to which it is or may be a party by forcing parties seeking information related to the litigation to obtain it through discovery if at all. Open Records Decision No. 551 (1990). The commission has not raised section 552.103 with regard to the information at issue. Under these circumstances, the companies lack standing to raise section 552.103.

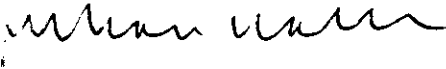
Section 552.101 protects, *inter alia*, information made confidential by judicial decision," including information coming within the common-law right to privacy. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Common-law privacy protects information if it is highly intimate or embarrassing,

such that its release would be highly objectionable to a reasonable person, *and* it is of no legitimate concern to the public. *Id.* at 683-85. In our opinion, none of the information in attachment 8 is protected by common-law privacy. You must release attachment 8.

In summary, you must withhold attachments 1 through 5 and attachments 9 and 10 under section 382.041(a) of the Health and Safety Code in conjunction with section 552.101 of the Government Code. You must also withhold information in attachments 6 and 6a to the extent they incorporate information we have found you must withhold under section 382.041(a) of the Health and Safety Code. You may withhold the marked portion of attachment 6 under section 552.111 of the Government Code. The remaining information responsive to the request must be released.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Sincerely,



William Walker  
Assistant Attorney General  
Open Records Division

WMW\eaf

Ref: ID# 123325

encl. Marked documents

cc: Mr. Bob Burtman  
Houston Press  
1621 Milam, Suite 100  
Houston, Texas 77002  
(w/o enclosures)

Mr. David T. Cindric  
Vinson & Elkins L.L.P.  
2300 First City Tower  
1001 Fannin Street  
Houston, Texas 77002-6760  
(w/o enclosures)